

IN THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

| | | |
|--------------------------------|---|---------------------------|
| In Re, |) | PETITION FOR AN |
| Kalid Sheikh Mohammed, |) | EXTRAORDINARY WRIT IN THE |
| Walid Muhammed Salih Mubarack |) | NATURE OF A WRIT OF |
| Bin Attash, |) | MANDAMUS |
| Ramzi Binalshibh, |) | |
| Ali Aziz Abdul Ali, |) | |
| Mustafa Ahmed Adam al Hawsawi, |) | CMCR Docket No. _____ |
| |) | |
| Petitioners, |) | |
| |) | |
| v. |) | 28 May 2008 |
| |) | |
| United States, |) | |
| |) | |
| Respondent. |) | |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF MILITARY COMMISSION REVIEW**

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PREAMBLE

Petitioners, Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin Attash, Ramzi Binalshibh, Ali Aziz Abdul Ali and Mustafa Ahmed al Hawsawi, respectfully request this Court issue an extraordinary writ in the nature of a writ of prohibition barring Respondent lower court from proceeding to arraignment in the case of *United States v. Khalid Sheikh Mohammed et al.*, in the absence of qualified defense counsel and, in light of the government's failure to provide the defense with adequate resources to review discovery.

I.

HISTORY OF THE CASE

On 11 February 2008, charges were initially preferred against Petitioners in this case. Between February 2008 and May 2008, the Chief Defense Counsel, Colonel Steven David detailed two military defense counsel to represent each Petitioner.

On 8 April 2008 counsel for Mr. Bin Al Shibh submitted to the Convening Authority a discovery request seeking evidence for matters in mitigation. The Convening Authority denied this request, and Mr. Bin al Shibh was therefore unable to submit matters in mitigation prior to the Convening Authority's referral decision.

On 10 April 2008, counsel for Khalid Sheikh Mohammed submitted a discovery request to the Convening Authority requesting evidence mitigating against the death penalty. This request was also summarily denied.

On 15 April 2008, a new set of charges was preferred in this case.

On 16 April 2008, the Legal Advisor to the Convening Authority transmitted his pretrial advice to the Convening Authority recommending that the Petitioners be tried jointly by a military commission authorized to impose the death penalty.

On 8 May 2008, counsel for Mr. Aziz Ali requested a delay in the referral decision on three interrelated bases. First, Mr. Ali provided counsel with potential evidence in mitigation which the defense team considered presenting the Convening Authority. The request to the Convening Authority explained that only one member of the defense team possessed the requisite security clearance to review this information. As a result, there was no defense “team” with which to discuss Mr. Ali’s communications or to strategize as to whether such information should be presented to the Convening Authority. Second, the request also notified the Convening Authority that the Office of the Chief Defense Counsel lacked the capacity to transmit this level of classified information and requested a delay in the referral decision until, even in the absence of consultation with other counsel, at the least the defense had the logistical capability to present the Convening Authority with this evidence. Finally, the defense requested a delay in referral to provide the government an opportunity to respond to the defense’s request for limited pre-referral discovery. The Convening Authority provided a pro forma denial of counsel’s request for a delay in the referral.

On 9 May 2008, the Convening Authority referred charges against Petitioners to be tried before a military commission authorized to impose the death penalty. The Convening Authority provided defense counsel with selected papers that accompanied the charges at referral. Neither the government nor the Convening Authority has provided the defense with the classified materials that she considered in her referral decision. The government has presumably failed to

provide these materials because the defense lacks a secure location in which to view and store the documents.¹

On 14 May 2008, the Chief Military Judge, Colonel Kohlmann, notified counsel that he had detailed himself to the case and set an arraignment date of 5 June 2008. Colonel Kohlmann informed counsel that requests for delay in the arraignment must be submitted by 19 May 2008.

Petitioners timely objected to 5 June arraignment date on the following general grounds²:

- 1) Inadequate opportunity for detailed military counsel to meet with Petitioners prior to the initial session based on the lack of flights to Cuba, the Convening Authority's decision to mandate that counsel sign a protective order and memorandum of understanding prior to meeting with their clients, Joint Task Force-Guantanamo's restrictive rules regarding client visitation;
- 2) Inability of Petitioners Aziz Ali and al Hawsawi to communicate with their detailed military defense counsel who lack TS/SCI clearances;
- 3) Inability of Petitioners to meet with, and to determine whether to retain civilian counsel based on their lack of TS/SCI clearances;
- 4) The need for a qualified defense team in a capital case at all stages of trial;
- 5) In the case of Petitioner Bin 'Attash, inadequate opportunity to communicate with counsel based on the failure to provide a translator with the requisite language skills and security clearance;
- 6) Inadequate facilities for defense teams to meet to consult regarding client communication (all communications with petitioners have been classified TS/SCI);
- 7) Inadequate facilities for defense teams to receive discovery, including documents which accompanied the charges at referral, pursuant to Rule for Military Commission 701(b)(1);

¹ The government indicated in its opposition to Petitioners' request for delay that the referral documents would be provided to the defense the week of 26 May 2008. To date, the government has not provided the classified referral documents.

² The individual requests for delay in the arraignment are attached at **Appendix A** (Khalid Sheikh Mohammed), **B** (Walid Muhammad Salih Mubarak Bin 'Attash), **C** (Ramzi Binalshibh), **D** (Ali Aziz Abdul Ali) and **E** (Mustafa Ahmed Adam Al Hawsawi).

- 8) Inadequate facilities for counsel to prepare memorandum for the trial court's consideration;³ and
- 9) The pending decision of the United States Supreme Court in *Boumediene v. Bush*, 127 S.Ct. 3078 (2007), which could impact the substantive and procedural rights of Petitioners in these proceedings.⁴

On 21 May 2008, Petitioners were served with a copy of the referred charges.

On 22 May 2008, Colonel Kohlmann directed that the government respond to the defense request for delay in the arraignment. Later that same day, the government provided its written opposition to the defense request for delay and Colonel Kohlmann entered his ruling denying the continuance request.⁵

In his ruling, Colonel Kohlmann concluded that the interests of justice were best served by continuing with the arraignment as scheduled. Notably, he identified three purposes which he intended the initial appearance to serve:

- "1) satisfy the RMC 707 requirement for arraignment of the accused in accordance with RMC 904 within 30 days of service of the referred charges;
- 2) provide the Military Judge the opportunity to advise the accused with regard to their rights to counsel and to ascertain whether or not the accused intend to exercise their counsel rights; and
- 3) ascertain what counsel, if any, will be representing the accused."

Commission Ruling D-002-006, dated 22 May 2006.

³ Petitioner Aziz Ali has already been prejudiced by the lack of these facilities in that he was unable to present relevant evidence in mitigation to the Convening Authority.

⁴ The Commission in *United States v. Salim Hamdan* granted a trial continuance finding that the Court's guidance in *Boumediene* "...permits all parties to have the benefit of a decision that may well change the tenor and conduct of the trial, and avoids the potential embarrassment, waste of resources, and prejudice to the accused that would accompany an adverse decision." *Hamdan* ruling dated 16 May 2008.

⁵ Colonel Kohlmann's ruling is attached as **Appendix F**.

To-date, the defense still lacks the capacity to transmit TS/SCI level classified information between Guantanamo and the offices in the Washington, DC, area.

Yesterday, detailed military counsel were informed they could only hand-carry materials between the two locations, and only if they obtained the appropriate badge and were escorted by another counsel. Since being detailed, any counsel who met with their client had to leave their notes from such meetings, and any other classified information, in Guantanamo, with no access to that information in Washington, DC.

II.

RELIEF SOUGHT BELOW

Petitioners have not sought relief below because the lower court is the Respondent in this case.

III.

RELIEF SOUGHT

Petitioners respectfully request this Court issue an extraordinary writ in the nature of a writ of prohibition barring Respondent lower court from proceeding with the initial session in the absence of qualified detailed military counsel, civilian counsel of the Petitioners' choice and in light of the government's failure to provide the defense with adequate resources to review discovery.

IV.

ISSUES PRESENTED

- A. WHETHER, IN A CAPITAL TRIAL, THE MILITARY JUDGE MAY DENY PETITIONERS THE OPPORTUNITY TO APPEAR WITH COUNSEL AT THE INITIAL SESSION.
- B. WHETHER, IN A CAPITAL TRIAL, THE MILITARY JUDGE MAY DENY PETITIONERS A DELAY IN THE INITIAL SESSION IN LIGHT OF PETITIONERS' CURRENT STRUCTURAL INABILITY TO ADEQUATELY DEFEND AGAINST A CASE INVOLVING SIGNIFICANT AMOUNTS OF CLASSIFIED MATERIALS.

V.

JURISDICTION

Under the All Writs Act, 28 U.S.C. section 1651(a), “all courts established by Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” Service courts of criminal appeals have the authority to exercise jurisdiction under the All Writs Act. *See, United States v. Dowty*, 48 M.J. 102 (C.A.A.F. 1998); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979); and *see also United States v. Frischholz*, 36 C.M.R. (C.M.A. 1966) (holding that All Writs Act is applicable not only to Article III courts, but to all courts established by Congress).

The Court of Military Commission Review was authorized by Act of Congress. 10 U.S.C. section 950f (Military Commissions Act of 2006). The procedures set out in the Military Commissions Act are based on the congressionally established procedures for military-courts martial. 10 U.S.C. section 948b (c). Although, under the Rules for Courts-Martial, there is no explicit provision granting service courts the authority to issue writs, the foregoing case law demonstrates that such power resides in the military appellate courts pursuant to the All Writs

Act.⁶ As the service court counterpart, the Court of Military Commission Review also has the authority to issue writs, if not pursuant to the All Writs Act, then as a function of its inherent authority as a reviewing court. *See Cheney v. U.S. Dist. Court for Dist. Of Columbia*, 542 U.S. 367 (2004) (recognizing that the All Writs Act codifies the common-law writ of mandamus, which was used in aid of appellate jurisdiction); *see also Schlagenhauf v. Holder*, 379 U.S. 104 (1964); and *Roche v. Evaporated Milk Assn*, 319 U.S. 21 (1943).⁷

Pursuant to the All Writs Act and the inherent authority of the Court, this Court may take action, pursuant to a petition for extraordinary relief, when three conditions are satisfied: “first the party seeking the issuance of the writ must have no other adequate means to attain the relief he desires; second, the petitioner must satisfy the burden of showing his right to the issuance of the writ is clear and indisputable; third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion must be satisfied that the writ is appropriate under the circumstances.” *Cheney v. U.S. Dist. Court for Dist. Of Columbia*, 542 U.S. 367 (2004).

Broadly stated, the mandamus authority of appellate courts extends to two situations. This Court may compel action requiring trial courts “to do that justice which they are in duty and by virtue of their office bound to do” *Dettinger*, 7 M.J. at 218, quoting *Virginia v. Rives*, 100 U.S. 313, 323 (1880). This Court may also prescribe action confining trial courts to the lawful

³ The discussion to Rules for Courts-Martial 1203 and 1204 recognizes the Courts of Criminal Appeals and the Court of Appeals for the Armed Forces ability to consider petitions for extraordinary relief.

⁷ *State v. Irick*, 906 S.W.2d 440, 442 (Tenn. 1995) provides persuasive authority regarding the nature of the writ in the absence of a state statutory or constitutional provision. “[M]andamus jurisdiction is merely ancillary to a court’s appellate power and is possessed not by virtue of any statute, but under the common law, as inherent and necessary to the exercise of its function as a court of appellate jurisdiction,” citing *State ex. Rel. Kain v. Hall*, 65 Tenn. 3, 7 (1873).

exercise of their jurisdiction. *See, Bankers Life and Casualty Company v. Holland*, 356 U.S. 379 (1953).

The relief Petitioners seek here, a stay in the initial session, is narrowly tailored and directly addresses the taint in the proceeding assuring the Petitioners due process of law and a fair trial. *See, Cooke v. Orser*, 12 M.J. 335, 345 (C.M.A. 1982), *citing United States v. Morrison*, 449 U.S. 361, 365 (1981).

VI.

REASONS WHY WRIT SHOULD ISSUE

THERE IS NO OTHER ADEQUATE MEANS TO STAY THE PROCEEDINGS

Petitioners submitted detailed requests for delay in the initial session to the military judge. The military judge denied the defense request for delay citing a need to arraign the accused within the time frame established by R.M.C. 707. Despite counsels' representations regarding their respective difficulties meeting with their clients, the military judge intends to ascertain whether Petitioners wish to exercise their rights to counsel and by whom they wish to be represented. Absent grant of this petition, the military judge will press forward with arraignment in the absence of qualified counsel charting a dangerous course for future proceedings in this case.

THE RIGHT TO COUNSEL IS FUNDAMENTAL, PARTICULARLY IN A CAPITAL CASE, OF THIS COMPLEXITY

The Convening Authority with the recommendation of the prosecution and her legal advisor, without any indication that factors in mitigation were considered, referred the case against Petitioners to trial by military commission authorized to impose the death penalty.

These proceedings are capital by definition. Consequently, the substantive and procedural protections, recognized by the United States Supreme Court and the military appellate courts, as necessary in a capital case, must apply in these proceedings to guarantee a reliable determination of both guilt and punishment.

In determining whether to grant Petitioners' writ, this Court must assess whether Petitioners possess a "clear and indisputable right" to a stay in the proceedings until qualified defense teams supported by adequate resources can be assembled. *Cheney*, 542 U.S. at 380. The Supreme Court characterized the importance of counsel: "The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice." *Kent v. United States*, 383 U.S. 541, 561 (1966). The right to counsel, particularly in a capital case of this complexity, must override any concern for expediency.

In an adversary system, the right to zealous representation by qualified counsel is critically important; all the more so in a capital trial. See *Powell v. Alabama*, 287 U.S. 45 (1932); *Wiggins v. Smith*, 539 U.S. 510 (2003). In 2003, the American Bar Association adopted *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (hereinafter "Guidelines"). The Guidelines articulate "the national standard of practice for the defense of capital cases." Guideline 1.1. The American Bar Association contemplated the application of the Guidelines to trials before military commission as reflected in the Discussion to Guideline 1.1, which sets out their jurisdiction. The Guidelines maintain that capital representation must be undertaken by a team of attorneys and other specialized professionals. Guideline 4.1 states that the defense team should consist of no fewer than *two* qualified counsel. The qualifications of counsel are addressed in Guideline 5.1. Guideline

5.1 eschews a numeric approach to capital qualification and assesses the defense team qualitatively.

The federal system, consistent with the American Bar Association Guidelines, mandates the appointment of two counsel in capital cases. *See* 18 U.S.C. § 3005. The Chief Defense Counsel also considered the Guidelines in his decision to detail two military counsel for each of the Petitioners in this case. Detailed military counsel, recognizing the gravity and complexity of these cases, have reached out to the civilian bar in attempt to create a qualified defense team under the ABA Guidelines. In support of Petitioners' request for delay, many of these counsel expressed their concerns to the military judge.⁸ The military judge dismissed counsel's concerns and downplayed the importance of the initial session.

The right of an accused to be represented by detailed military counsel or civilian counsel has been long-recognized in military law. *See United States v. Kinard*, 45 C.M.R. 74 (C.M.A. 1972); *United States v. Donohew*, 39 C.M.R. 149 (C.M.A. 1969). Inherent in this right, is the right to effective representation. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Scott*, 24 M.J. 86 (C.M.A. 1987). These protections have been incorporated into the military commissions system. They are not ritualistic-they are intended to protect the Petitioners and to ensure that the process is reliable. In this case, the government has obstructed Petitioners ability to form attorney-client relationships with their detailed counsel and from selecting civilian counsel to assist in their representation.

Petitioners have not had sufficient time to exercise their rights to counsel in an informed fashion. Each have been detained for a period of years, yet have only met with

⁸ Two of the declarations submitted by civilian counsel are attached at **Appendix G**.

counsel a handful of times. None of the Petitioners have regular contact with the outside world providing sufficient access to seek out a civilian attorney of their own choosing, as is their right under the Military Commissions Act. *See* R.M.C. 506 (“Accused’s rights to counsel”). Petitioners need the assistance of counsel to exercise their right in a meaningful manner.

While all capital cases are inherently complex, the Petitioners’ case involves unique issues for all defense counsel involved. The Petitioners’ extended imprisonment and isolation at the hand of the United States government creates unavoidable hurdles in building the rapport and gaining the trust necessary to facilitate an effective attorney-client relationship. It is also vital to note that Petitioners are not familiar with an Anglo-American legal structure. The notion that a uniformed government representative could also be their representatives would be difficult to comprehend for any accused first confronting this system. These Petitioners, who hail from different countries and cultural mores, it is an anathema. The detailed military defense counsels’ clear association with the United States military, combined with the sudden precipitation of the criminal process, further compounds this issue. While the issue itself is likely not insurmountable in most cases, it does require additional time for the attorneys and clients to meet and establish a working relationship that is absent from other capital cases.

For example, in Petitioner Bin al Shibh’s case, the classification restrictions presently in place have prevented Mr. Bin al Shibh from meeting with his civilian counsel of record, Mr. Durkin. Further, neither detailed military counsel nor Mr. Durkin are qualified under the relevant American Bar Association guidelines to handle a death penalty case. *See* Guideline 5.1.

Each other Petitioner is in a similar position. Mr. Hawsawi and Mr. Azi Ali, for example, have each been detailed two military defense attorneys but one on each team has yet to be provided with the required security clearance, and therefore have not yet met their detailed military counsel. Consequently, these Petitioners do not have the benefit of a functional defense team that can discuss the case or map out strategy.

Petitioners, on their own, cannot seek out civilian attorneys who possess the requisite qualifications for participation in the Commission. Any such potential counsel, moreover, will have to obtain a top secret clearance before they can meet with any of the accused to determine if they can work with them; the process for obtaining a clearance takes well over a month, at best. Furthermore, the ABA Guidelines require that an adequate capital defense team assembled to defend an individual facing the ultimate penalty include a mitigation expert. *See id.*, Guideline 4.1. The Rules for Military Commission provide no means for requesting a mitigation expert prior to referral of the charges, which occurred here only on 9 May 2008. *See* R.M.C. 703. The most rudimentary defense team, therefore, has not even been assembled for any of the Petitioners. As such, the arraignment cannot continue as scheduled on 5 June 2008.

THE ABILITY TO PROVIDE PETITIONERS WITH
EFFECTIVE ASSISTANCE OF COUNSEL APPLIES AT ALL
STAGES OF LITIGATION AND IS HEAVILY DEPENDENT
ON THE GOVERNMENT'S ALLOCATION OF RESOURCES

Due to the restrictions imposed by the government, client conversations, attorney notes and any subsequent use of such material is presumptively classified at the highest level, TS/SCI, and, therefore, must be maintained in an area that has been certified to that security level (also referred to as "Sensitive Compartmented Information Facility" or

“SCIF”). Only last week, and for the first time, was a SCIF designated for defense use aboard Guantanamo Naval Station. Prior to that, those counsel who were able to meet with Petitioners were required to leave their notes in Guantanamo, with the office of the Staff Judge Advocate. However, the identified SCIF serves only as a storage location. To-date, there is no location to process such classified data available to any defense team.⁹ The computer network and infrastructure that the defense must ostensibly use to transfer documents to and from Guantanamo (classified scanner, fax, etc...) has not yet been created.

In the Arlington, VA, defense office, only one room is presently certified as a SCIF that is available to detailed counsel. That room does not have five working computers for each defense counsel on this case, or five desks. In addition, it is occupied by computer technician contractors, who are there to maintain the future computer system that is already supposed to be in place but has yet to be constructed. Should counsel need to utilize this mini-SCIF to discuss TS/SCI information, these technicians must be asked to leave the space so that counsel may freely discuss matters in confidence.

The absence of properly outfitted SCIFs and of adequate working mechanisms for transferring classified information to and from Guantanamo directly limits the ability of Petitioners’ counsel to work on their case. Classified discovery that defense may receive cannot presently be taken to Guantanamo, information obtained while at Guantanamo cannot presently be removed from Guantanamo, and such material can only be stored, not

⁹ The failure to provide the defense with this basic infrastrucre has resulted in prejudice to the Petitioners; Petitioners were unable to file classified materials in support of their motion to dismiss based on unlawful influence. *See D001-Defense Reply* filed 28 May 2008.

processed, in either Guantanamo or in Arlington, VA. At this time, no clear deadline for the remedy of these issues has been established and provided to counsel.

If counsel do not have the most basic resources necessary to defend their case, they cannot advise Petitioners or the military judge regarding the fundamental issues to be determined at arraignment. The military judge abused his discretion when he failed to recognize the importance of providing Petitioners the opportunity to adequately consult with counsel in order to make a knowing election of rights at the initial session. Accordingly, Petitioners' arraignment must be delayed until the government addresses and resolves these logistical issues.

THE MILITARY JUDGE'S DECISION TO PRESS FORWARD
WITH THE INITIAL SESSION IN THE ABSENCE OF
COUNSEL CONSTITUTES CLEAR ERROR WHICH
WITHOUT CORRECTION MAY REOCCUR

In criminal proceedings, an arraignment signals no less than the onset of a criminal prosecution. *See Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877 (1972). The Supreme Court has emphasized the import of the initiation of criminal process:

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 689-90, citing *Powell v. Alabama*, 287 U.S. 45 (1932).

When the government arraigns an individual, therefore, it purports to be prepared for trial, to be disposed to place against an accused the full weight of any evidence it has. At this stage of a criminal proceeding, the Supreme Court has unequivocally and repeatedly held that an accused has the right to the aid of counsel. *See Powell*, 287 U.S. at 69; *Kirby*, 406 U.S. at 689, n. 6 (Sixth and Fourteenth Amendment right to counsel attaches at or after initiation of adversary judicial proceedings); *United States v. Gouveia*, 467 U.S. 180, 187-88, 104 S.Ct. 2292 (1984) (same).

It is axiomatic that an accused has the right to counsel not merely at the time of trial itself, but from the inception of a criminal prosecution. The time leading up to trial is critical in fact, for it is when in-depth investigation into the government's evidence occurs, and when counsel confers with an accused to discuss objectives in the case. *See Powell*, 287 U.S. at 57 (referring to the time from arraignment until the beginning of trial as "perhaps the most critical period of the proceedings...when consultation, thoroughgoing [sic] investigation and preparation were vitally important," when defendants are as much entitled to aid of counsel as during the trial itself). The presence of adequate counsel at the initial stage of a criminal proceeding is therefore a fundamental notion of jurisprudence.

The right to counsel reaches anything necessary to afford a meaningful defense. *See United States v. Wade*, 388 U.S. 218, 225, 87 S.Ct. 1926 (1967) ("The plain wording of this [Sixth Amendment] guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful defense.") It follows that the impairment of the right to counsel at early stages of a criminal proceeding can impact the right to assistance of counsel at the trial itself. *Cf. id.* at 227 (finding that Court must scrutinize any pretrial confrontation of an accused with the

government, to ascertain whether presence of counsel is necessary to preserve basic right to fair trial).

The Commission and the government here have taken the position that the mere presence of a detailed counsel satisfies any constitutional or commission requirements. This summary conclusion ignores the fundamental and structural defects that presently exist in Petitioners' case. Such defects, if allowed to continue, undermine the entire framework for this Military Commission. Absence of counsel from arraignment, inability for each Petitioner to make an effective choice of counsel, inability of counsel to effectively prepare their case, are rights that cannot be ignored and pushed aside as they preclude the preparation of any meaningful defense. *See Wade*, 388 U.S. at 225. To push forward without providing the defense the fundamental right to adequate counsel and resources, particularly where no countervailing concerns are present, sets the stage for a process that cannot be just and reliable. The military judge's decision to proceed in light of structural error of this magnitude transcends abuse of discretion and demands reversal.

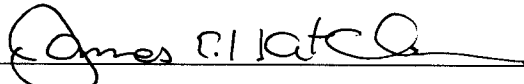
APPENDIX

- A) Request for Continuance, Khalid Sheikh Mohammed
- B) Request for Continuance, Walid Muhammad Salih Mubarak Bin Attash
- C) Request for Continuance, Ramzi Bin al Shibh
- D) Request for Continuance, Ali Abdul Aziz Ali
- E) Request for Continuance, Mustafa Ahmed Adam al Hawsawi
- F) Commission's Ruling dated 22 May 2008
- G) Declarations of Counsel, Jeffrey Robinson and Amanda Lee

Respectfully Submitted,

By: /s/_____

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ATTACHMENT A

Fitzgibbons, Amy, MAJ, DoD OGC

From: [REDACTED] CAPT, DoD OGC

Sent: Monday, May 19, 2008 3:03 PM

To: [REDACTED]

Cc: [REDACTED]

Subject: Motion to Continue in the case of United States v. Khalid Sheikh Mohammed

Signed By: [REDACTED]

UNITED STATES OF AMERICA,

v.

KHALID SHEIKH MOHAMMED,

)
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)
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)
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**Defense Motion
For Continuance**

19 MAY 2008

1. Timeliness: Timeliness: This request is filed within the timeframe established by the Military Judge's order of 14 May 2008.

5/28/2008

2. **Relief Requested:** The Defense respectfully requests that this Commission grant a continuance of the 5 June 2008 arraignment date. The defense respectfully requests the Military Judge set the date for arraignment at such time that the government provides the necessary access, clearances and facilities to allow the defense to adequately represent the accused, Khalid Sheikh Mohammed (Mr. Mohammed).

3. **Overview:** Counsel's ability to meet with Mr. Mohammed and form an attorney-client relationship in this death penalty case has been very limited and assistant detailed counsel has not met with Mr. Mohammed at the time of this request. Even when meetings have occurred, evolving security procedures have limited counsel's ability to appropriately represent Mr. Mohammed. Civilian counsel have not yet received the needed security clearances, affecting their involvement in the case, even to the extent of forming the initial attorney-client relationship.

Specific conflicts also exist for the date currently set by the Commission. Assistant Military Counsel has previously scheduled leave that involves family commitments for the week of the presently scheduled arraignment.

Arraignment marks the formal commencement of proceedings before the Commission. If the Commission does not grant the requested continuance, the Defense will be in the position of commencing the proceedings with an incomplete team and will thus not be prepared to render effective assistance of counsel to Mr. Mohammed.

4. **Burden of Proof:** The defense bears the burden of proof as the moving party on this motion and the standard is proof by a preponderance of evidence. RMC 905(c).

5. **Facts:**

- a. Charges against Mr. Mohammed were referred to this Military Commission on 9 May 2008. The charges were not forwarded to Defense Counsel until 1705 hours, 12 May 2008. Counsel is not aware of whether they have yet been served on Mr. Mohammad as is required by R.M.C. Rule 602. The charges allege a complex conspiracy spanning several years, involving alleged conduct taking place over a number of years.
- b. Prior to preferral of charges on 11 February 2007, Mr. Mohammad had been held without access to legal representation for a period of nearly 5 years after his capture on or about 1 March 2003. Defense Counsel was detailed on or about 8 April 2008 and met with Mr. Mohammad as soon as security "read ons" permitted and transportation could be arranged to Guantanamo. At this point, he has met with Mr. Mohammad on several occasions for a total of approximately 10 hours.

- c. Assistant Defense Counsel was detailed on 28 April 2008, but he has not yet had an opportunity to meet with Mr. Mohammed. Mr. Mohammad is, however, aware that Assistant Defense Counsel has been appointed. (As a note to provide perspective, the Commission should be aware that Guantanamo JTF personnel request a two week advance notice of a meeting with a High Value Detainee (HVD) such as Mr. Mohammed and travel arrangements to Guantanamo frequently themselves call for such a lead time.) A joint meeting involving detailed defense counsel and assistant defense counsel scheduled for the week of 5 May – when assistant defense counsel was on Guantanamo for other work - was cancelled because detailed defense counsel's flight was cancelled. Assistant detailed defense counsel's first meeting with Mr. Mohammed is now scheduled for the week of 26 May.
- d. Numerous security issues affect the preparation of these cases even at these beginning stages. Following any meeting with Mr. Mohammed, all resultant written notes are immediately classified Top Secret / SCI (TS-SCI) and retained at Guantanamo where they are currently accessible only when counsel next meets with Mr. Mohammed. Defense counsel work areas, both at Guantanamo Bay, Cuba and Washington DC, lack a secured facility to store any classified material, to include even notes from meetings with Mr. Mohammed, or permit communications between counsel. Pending the construction of a larger SCIF in the Office of Military Commissions –Defense (OMC-D) office, all teams involved in the preparation of the cases of the 9-11 co-defendants can discuss any TS-SCI information only in a small office-sized shared facility in the OMC-D office in Rosslyn. The construction schedule for the SCIF in Washington DC has failed to materialize; construction on a facility that was to be completed before the end of 2007 has commenced, but may not be concluded until mid or late August 2008.
- e. Mr. Mohammed's civilian counsel have not yet obtained TS-SCI security clearances. Consequently, information gained from Mr. Mohammed, by definition classified at the TS-SCI level, cannot be shared with these counsel. Even more significantly, these counsel are prohibited from meeting with Mr. Mohammed until they are TS-SCI qualified and cannot form any type of attorney-client relationship or even ask him whether he desires their legal representation. Counsel is advised that this should be completed within 5 weeks of the date of this motion, however.
- f. Assistant Defense Counsel has scheduled leave that includes a family vacation for the week of the currently scheduled arraignment date. At this late date, these timeshare reservations cannot be cancelled without incurring substantial financial loss. Based on the climate existing among the accused at Guantanamo, counsel cannot envision that Mr. Mohammed will sign the required waiver of appearance of counsel containing the many certifications mandated by commission rules (i.e., that the accused certifies his belief that the counsel who will attend the hearing at competent to handle the hearing). Moreover, requesting said defendant to sign such a waiver would impair the attorney-client relationship.

6. Argument:

- a. The Military Judge should grant the defense request for a continuance. It is within his authority to do so. MCA § 949e provides that the "military judge . . . may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." Rule for Military Commission (RMC) 707 additionally provides for the granting of a continuance in the "interests of justice" Such action is necessary here to ensure that the

accused has effective assistance of counsel.

- b. Like the Sixth Amendment, the MCA guarantees the right of the accused to the "assistance of counsel." MCA § 949a(b)(1)(C). Courts have long recognized that in order for the right to counsel to be meaningful, counsel must have adequate time to prepare a defense. Thus, the Supreme Court stated in *Powell v. State of Ala.*, 287 U.S. 45 (1932): "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." *Id.* at 59.
- c. Similarly, the Court frequently has emphasized that the representation of a capital defendant requires specialized training, skill and experience in the investigation and presentation of evidence at both the guilt phase and potential penalty phase of the case. The Court has "long referred to" the American Bar Association (ABA) standards "as 'guides to determining what is reasonable'" in the representation of capital defendants. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland*, 466 U.S. at 688); *see, also, Williams v. Taylor*, 529 U.S. 362, 396 (2000). As the Court explicitly noted with approval in *Wiggins*, "[t]he ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor,' and that the scope of the necessary investigation that counsel should consider includes the defendant's 'medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.'" *Wiggins*, 539 U.S. at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93; 11.8.6, p. 133 (1989) (Court's emphasis)).
- d. Equally significant, the Court also emphasized that the ABA Standards contemplate that counsel "also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially," as well as "to the court at sentencing." *Wiggins*, 539 U.S. at 524-525 (quoting ABA Guidelines 4-4.1, commentary, p. 4-55 (2d ed.1982) (emphasis added)). Accordingly, Mr. Mohammed should be entitled to, and counsel will require the assistance of expert assistants who are necessary to dispute the Government's case at both the guilt and any sentencing phase of the case. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68 (1985).
- e. Counsel's assessment is not offered in denigration of his own skills and ability, but reflects his dedication to his client and the recognition of his obligations under "well-defined norms" for handling such complex cases. *Wiggins*, at 254. The defense respectfully submits that there is no justification for preventing Mr. Mohammed from having the assistance that detailed military counsel deems necessary to his effective representation. *See Massaro v. United States*, 538 US 538 US 500, 503 (2003) ("ineffectiveness was evident from the record" where trial counsel failed to request continuance to evaluate new evidence). Nor will an enlargement of the time for civilian defense counsel to take the steps necessary to appear in this case compromise any legitimate interest of the parties:
- f. While a trial court's decision on a continuance request is generally reviewed for abuse of discretion, a trial court may not exercise its discretion over continuances so as to deprive the defendant or his attorneys of a reasonable opportunity to prepare. *See, e.g., People v. Snow*, 65 P.3d 749 (Cal. 2003); *Phillips v. State*, 386 N.E.2d 704 (1979) (Trial court must weigh Defendant's right to effective assistance, and to be effective, counsel must be given sufficient opportunity to adequately prepare his case.)

- g. Due to matters outside the defense's control, and within the government's control, defense respectfully request a continuance until such time the government supplies: access to the client such that counsel may prepare a defense; the requisite security clearances for members of the defense team; and the appropriately secured facilities to store classified material and allow for defense preparation of this case.
- h. As these matters are outside of defense's control, the defense is unable to specify a date of availability. The defense respectfully requests a RMC 802 telephonic conference with all parties at an established interval of time to ascertain the progress of the requested items. Defense seeks only to fully and adequately represent Mr. Mohammad at each stage of these proceedings and allow him the competency of counsel to which he is entitled.

7. **Oral Argument:** The Defense does not request oral argument in connection with this motion but, as is noted above, does request a RMC 802 telephone conference with all parties to establish a hearing date.

8. **Witnesses:** None.

9. **Conference with Opposing Counsel:** The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

DATED this 19th day of May, 2008.

Respectfully submitted,

By _____/s/_____
Prescott L. Prince, CAPT, JAGC, USNR
Michael Acuff, LTCOL, JAGC, USAR
Detailed Defense Counsel for
Khalid Sheikh Mohammed
Office of Military Commissions
Franklin Court Building, Suite 2000E
1099 14th St., NW
Washington, DC 20005
Tel: (703) 588-0426
Fax: (703) 588-2046

ATTACHMENT B

From: [REDACTED]
Sent: Friday, May 16, 2008 5:28 PM

To: [REDACTED]
Cc: [REDACTED]

Subject: [REDACTED]
Signed By: [REDACTED]

Sir, The defense respectfully submits the following request for continuance with the Court:

1. **Timeliness:** This request is filed within the timeframe established by the Military Judge's order of 14 May 2008.
2. **Relief Requested:** The Defense respectfully requests that this Commission grant a continuance of the 5 June 2008 arraignment date. The defense respectfully requests the Military Judge set the date for arraignment at such time that the government provides the necessary access, clearances and facilities to allow the defense to adequately represent the accused, Walid Muhammad Salih Mubarak Bin 'Attash (Mr. Bin 'Attash).
3. **Overview:** Detailed defense counsel have had limited access and opportunity to communicate with Mr. Bin 'Attash, and all communications that have transpired result in classified material which the defense is unable to secure in a defense controlled area. The communications with Mr. Bin 'Attash are further hindered by failing to obtain a translator with the requisite security clearance; the interim translator that has been used is assigned to another case. Additionally, the lack of a defense secured facility has also hindered communications within the defense team itself. If the Commission does not grant a continuance of the 5 June arraignment, the defense will not be in a position to be adequately prepared for arraignment and render effective assistance of counsel to Mr. Bin 'Attash.
4. **Burdens of Proof and Persuasion:** As the moving party, the defense bears the burden on this motion.
5. **Facts:**
 - a. Charges against Mr. Bin 'Attash were referred to this Military Commission on 9 May 2008 and served on the defense at 1705 hours, 12 May 2008. The charges allege a complex conspiracy spanning several years, involving alleged conduct taking place in or about 1996 to in or about May 2003.
 - b. Prior to referral, detailed defense counsel were unable to meet with Mr. Bin 'Attash. The only time detailed counsel have met with Mr. Bin 'Attash, a translator assigned to a co-accused's case was utilized. The defense requested translator does not have the requisite clearance to assist and it is unknown if and when he will have the requisite clearance.
 - c. Defense counsel work areas, both at Guantanamo Bay, Cuba and Washington DC, lack a secured facility to store any classified material, to include all information derived

from Mr. Bin 'Attash, or permit communications between counsel. The construction schedule for the SCIF in Washington DC has failed to materialize; it was to be built by the end of 2007 but construction has yet to begin.

6. Argument: The Military Commission Should Grant a Continuance in Order to Give the Defense an Adequate Opportunity to Prepare for Trial.

a. The Military Judge should grant the defense request for a continuance. It is within his authority to do so. MCA § 949e provides that the "military judge . . . may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." Rule for Military Commission (RMC) 707 additionally provides for the granting of a continuance in the "interests of justice" Such action is necessary here to ensure that the accused has effective assistance of counsel. Like the Sixth Amendment, the MCA guarantees the right of the accused to the "assistance of counsel." MCA § 949a(b)(1)(C). Courts have long recognized that in order for the right to counsel to be meaningful, counsel must have adequate time to prepare a defense. Thus, the Supreme Court stated in *Powell v. State of Ala.*, 287 U.S. 45 (1932): "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." *Id.* at 59. While a trial court's decision on a continuance request is generally reviewed for abuse of discretion, a trial court may not exercise its discretion over continuances so as to deprive the defendant or his attorneys of a reasonable opportunity to prepare. See, e.g., *People v. Snow*, 65 P.3d 749 (Cal. 2003); *Phillips v. State*, 386 N.E.2d 704 (1979) (Trial court must weigh Defendant's right to effective assistance, and to be effective, counsel must be given sufficient opportunity to adequately prepare his case.)

b. Due to matters outside the defense's control, and within the government's control, defense respectfully request a continuance until such time the government supplies: access to the client such that counsel may prepare a defense; the requisite clearance for the requested translator to assist in communications with Mr. Bin 'Attash; and the appropriately secured facilities to store classified material and allow for defense preparation of this case.

c. As these matters are outside of defense's control, the defense is unable to specify a date of availability. The defense respectfully requests a RMC 802 telephonic conference with all parties at an established interval of time to ascertain the progress of the requested items. Defense seeks only to fully and adequately represent Mr. Bin 'Attash at each stage of these proceedings and allow him the competency of counsel to which he is entitled.

7. Oral Argument: The Defense does not request oral argument in connection with this motion.

8. Witnesses: None.

9. Certificate of Conference: The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

10. Additional Information: In making this request, Mr. Bin 'Attash does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in all appropriate forms.

Respectfully submitted by:
LCDR JAMES HATCHER, JAGC, USNR
Capt CHRISTINA JIMENEZ, USAF
Detailed Defense Counsel for Walid Muhammad Salih Mubarak Bin 'Attash

v/r
CHRISTINA M. JIMENEZ, Capt, USAF
Defense Counsel
Office of Military Commissions
Office of the Chief Defense Counsel
Comm: (202) 761-0133 x 111 / Fax: (202) 761-0510

ATTACHMENT C

UNITED STATES OF AMERICA

v.

RAMZI BIN AL SHIBH

**Defense Motion
for Special Relief
to Delay Arraignment**

19 May 2008

1. **Timeliness:** This special request for relief is filed within the time this commission has prescribed, in its order of 14 May 2008, for a request for delay in the scheduled arraignment.
2. **Relief Sought:** The defense respectfully submits that a continuance of the arraignment is necessary and in the interests of justice. Concomitantly, the defense seeks an extension of time in which to file voir dire questions to be submitted to the military judge.
3. **Burden of Proof:** The defense bears the burden of proof, pursuant to R.M.C. 905(c) on any question of fact; this burden is met by a showing of a preponderance of evidence.
4. **Facts:**
 - a. On 14 May 2008 the Military Judge ordered that the arraignment in this case take place on 5 June 2008. This arraignment is to be held aboard Guantanamo Naval Station, Cuba. In the same order, the military judge also provided deadlines for filing a request for continuance (19 May), submission of notice of appearance by civilian counsel (19 May), and submission of written questions to voir dire the military judge (26 May).
 - b. Detailed counsel have only met three times with Mr. Bin al Shibh. The initial meeting was delayed due to requirements which the

government, via the Convening Authority, imposed on defense counsel. Specifically, the government sought to issue a protective order and obtain counsel's signature on a memorandum of understanding regarding the treatment of classified information. Detailed counsel's meeting with Mr. Bin al Shibh was delayed because the government was unable timely to administer this process of issuing an order and MOU. The meeting was further delayed because the government then made counsel's signing of the MOU a condition precedent to any meeting between counsel and Mr. Bin al Shibh.

- c. Travel to Guantanamo Bay Naval Station is arduous in that the flights to the base are limited to only a few possible options a week, even these options are unreliable in their arrival times (if, that is, the flight is not canceled altogether), and counsel are required to reserve seats weeks in advance. Flight arrangements take inordinate amounts of time. Counsel rely on an active duty military paralegal to make these arrangements; this paralegal is also assigned to two other commission cases, and handles numerous other administrative tasks for the Office of the Chief Defense Counsel.
- d. Along with the above travel difficulties involved in meeting with Mr. Bin al Shibh, the Staff Judge Advocate's Office for Joint Task Force-Guantanamo (SJA JTF-GTMO), which handles visits with any camp detainees at the prison, requires defense counsel to provide 14 days' notice prior for any visit with any detainee. In addition, counsel may only meet in only two time slots per day with any client: the morning from approximately 0830 until 1130, and the afternoon from approximately 1300 until 1630. Finally, per the SJA's office, JTF-GTMO, counsel for 'high value' detainees may not divide the meeting times to share with fellow counsel, so that each could meet with their client for a shorter period in the morning.
- e. The government has decreed that all information derived from any so-called 'high value' detainee, such as Mr. Bin al Shibh, is classified as TOP SECRET (TS/SCI). Accordingly, reference notes detailed counsel take during interviews are classified TS/SCI, and must be maintained in an area that has been certified to that security level (also referred to as "Sensitive Compartmented Information Facility" or "SCIF"). There is no such area available to detailed counsel aboard Guantanamo Naval Station. The one room presently certified as a SCIF that is available to detailed counsel is located in the Office of the Chief Defense Counsel, in Arlington, VA. That room does not have working computers for counsel to use, and it is occupied by computer technician contractors ostensibly there to maintain the system that is to be put in place; these technicians must be asked to leave the room every time counsel enter to discuss their case together.

- f. The absence of a SCIF, and of a mechanism for transferring classified information back to Arlington, VA, also means that any classified discovery that defense may receive cannot be taken to discuss with the client on-board Guantanamo, cannot be carried off Guantanamo, cannot be maintained with the defense in Guantanamo, and can only be held in the one room that is a certified SCIF, in Arlington, VA.
- g. To-date, the government has not provided to the defense any substantive information, including the information considered by the Convening Authority prior to referral; specifically, the defense has not receive the "binder" that the Legal Advisor to the Convening Authority references in his advice to the Convening Authority, given during the referral process.

5. Discussion:

RIGHT TO COUNSEL. At the arraignment, Mr. Bin al Shibh will be asked to state by whom he wants to be represented. Although detailed military counsel have met with him on several occasions, detailed counsel requires additional time to establish a working relationship with Mr. Bin al Shibh. Detailed counsel should be granted deference with this request as it has many obstacles to overcome in this pursuit, including but not limited to the fact that it is reasonable to expect that the accused has an inherent distrust of all U.S. military personnel. Mr. Bin al Shibh also has not yet been able to meet with civilian counsel, since that counsel's security clearance remains pending adjudication with the government.

LACK OF RESOURCES/FACILITIES. As referenced above, the defense must operate in an extremely challenging environment in representation of Mr. Bin al Shibh due to the government's decision to classify information derived from him and from any other 'high value' detainee. The practical effect of the lack of a SCIF is that detailed counsel's notes are taken from them, sealed in a signed envelope, and maintained at the office of the SJA JTF-GTMO. Detailed counsel have no means of taking the notes

back with them to their offices in Arlington, VA; detailed counsel are unable to work with the notes in their offices on-board Guantanamo Naval Station; and counsel cannot even confer with each other about any discussions had with any 'high value' detainee, unless they return to Arlington, VA, and enter the SCIF located in the office, but only after finding a time when the SCIF is free from third-parties so counsel can discuss privileged matters. The defense therefore cannot even begin to develop any case strategy because substantive discussions are precluded everywhere but in one room in the Office of the Chief Defense Counsel in Arlington, VA. The defense is without a reasonable alternative to remedy this major limitation as the Office of the Chief Defense Counsel has no budget of its own, nor the authority to certify its own SCIF. The government has not fulfilled its obligations to ensure the defense has the proper resources to defend Mr. Bin al Shihb.

LACK OF DISCOVERY. The defense has not received any substantive discovery the government is required to provide. *See* R.M.C. 701. In addition, the defense does not have the ability to receive, store, or analyze this information due to the absence of the requisite certified area, or SCIF, where classified information can be examined, as discussed above. Thus, the defense has no understanding of the volume of evidence or scope of legal issues that may be germane to this case. Under these conditions, it would be impossible for the defense to come to any realistic agreement about a trial schedule at the time of arraignment.

TRAVEL AND VISITATION PROBLEMS. Taken together, the logistical issues involved in traveling to Guantanamo, coupled with the SJA JTF-

GTMO's restrictions on client visits, inherently build in weeks of delay to the process of communicating with Mr. Bin al Shibh.

TRIAL SCHEDULE. On 14 May, the Military Judge stated that at the arraignment he "will establish a full schedule for the litigation of this case." The military judge further ordered that counsel discuss scheduling prior to the arraignment and endeavor to agree upon a schedule. Based upon the foregoing, the defense is unable to participate in any meaningful discussions about a reasonable trial schedule.

6. **Relief Requested:** The defense respectfully requests as follows:

- a. An extension of time for the arraignment until a date to be determined, with the specification that the entire period for this extension of time does not constitute excludable delay, for speedy trial purposes, under R.M.C. 707. This request for an extension of time serves the interest of justice in that it seeks to assure the resources necessary for adequate representation by counsel. The defense does not stipulate that the requested delay should be attributed to the defense as excludable delay, and does not waive the right to assert possible speedy trial violations based upon this, or future, delays in the proceedings.
- b. As the government controls the security clearance adjudication process, the defense is unable to determine when civilian counsel will be cleared to meet personally with Mr. Bin al Shibh. The defense requests that the Military Judge order the government to provide the defense and the Judge an update regarding the status of this clearance, no later than 1630 on 09 June 2008.
- c. As the government controls the construction and certification of a SCIF, the defense is unable to handle classified information in a manner that would permit adequate representation of Mr. Bin al Shibh. The defense requests that the Military Judge order the government to provide the defense and the Judge with a status report on the completion of the required facilities no later than 1730 on 09 June 2008.
- d. An extension of time to file a notice of appearance for any additional civilian counsel, until a date to be determined (for further discussion of this concern, *see* "Ramzi Bin al Shibh Motion for Modification of Commission Order dtd 14 May 08").

- e. An extension of time to file written questions to voir dire the military judge until a date to be determined, no later than one week prior to the date of arraignment.
7. **Certificate of Conference:** The defense has conferred with the trial counsel in this case. The government opposes this motion.
8. **Oral Argument:** The Defense does not request oral argument on this motion.
9. **Witnesses/Evidence:** Not applicable.

//s//

Suzanne M. Lachelier
CDR, JAGC, USN
Detailed Defense Counsel

//s//

Richard E.N. Federico
LT, JAGC, USN
Detailed Defense Counsel

ATTACHMENT D

Fitzgibbons, Amy, MAJ, DoD OGC

From: [REDACTED]
Sent: Monday, May 19, 2008 3:06 PM

To: [REDACTED]

Cc: [REDACTED]

Subject: U.S. v. Mohammad et al-Request for Arraignment Delay and Other Relief (Ali Azi Abdul Ali)

Signed By: amy.fitzgibbons@us.army.mil

Attachments: Dec of Mr. Robinson 5-19-08.pdf; Dec of Ms. Lee re NOA 5-19-08.pdf; Form 9-2 of Mr. Robinson 2-27-08.pdf; Form 9-2 Ms. Lee 2-25-08.pdf; Qualification Letter - Mr Robinson.pdf; Qualification Letter - Ms Lee.pdf; US v Hamdan ruling dtd 2008-05-16.pdf

Sir,

The defense, on behalf of Mr. Ali Abdul Aziz Ali, respectfully submits the following request for continuance in the arraignment and an enlargement of to file its written voir dire:

1. Timeliness. This request for relief is filed within the time frame established by the Military Judge's order of 14 May 2008.

2. Relief Sought. The defense respectfully requests this Commission grant a delay in the arraignment scheduled for 5 June 2008 until such date that both military and civilian counsel possess the required security clearances and have the opportunity to consult with Mr. Ali. Although the defense does not control the processing of security clearances, the defense anticipates that detailed military counsel and at least one civilian counsel will be granted their clearances within 60 days. The defense also requests an enlargement of time to file both notice of appearance of civilian counsel and written voir dire to the Military Judge.

3. Overview. The defense respectfully requests a delay in the arraignment until a competent defense team is assembled to represent Mr. Ali. To date, lead counsel is the only attorney qualified to communicate with Mr. Ali. He cannot, alone, provide Mr. Ali with effective representation. Detailed counsel have diligently sought the assistance of civilian counsel with significant federal criminal litigation experience. These civilian counsel have been qualified by the Chief Defense Counsel to represent detainees conditioned on approval of their security clearances. Consequently, civilian counsel have not met with Mr. Ali and therefore, cannot ethically enter a notice of appearance. *See*, Declarations of Mr. Jeffrey Robinson and Ms. Amanda Lee. The defense seeks additional time for detailed military counsel and civilian counsel

5/27/2008

to meet with Mr. Ali. Civilian counsel may then file their notices of appearance and assist detailed counsel in representing Mr. Ali at arraignment.

The defense also seeks the opportunity to conduct a comprehensive voir dire of the Military Judge consistent with R.M.C. 902. The starting point for this voir dire will be the written questions required by this Commission's order to be submitted on 26 May 2008. To allow for meaningful participation of all counsel, the defense requests an enlargement of time to file its written voir dire.

4. Statement of Facts.

a. LCDR Mizer was detailed to represent Mr. Ali on 7 April 2008. LCDR Mizer met with Mr. Ali shortly before the charges against him were referred to a commission authorized to impose the death penalty. Mr. Ali is receptive to working with both additional detailed counsel and civilian counsel. LCDR Mizer is also lead military counsel in *U.S. v. Salim Hamdan*.

b. On 16 May 2008, Judge Allred granted a defense request for delay in Mr. Hamdan's trial based on the need for a competency determination, the pending decision of the U.S. Supreme Court in *Boumediene v. Bush* and to allow counsel additional time to dissuade Mr. Hamdan from boycotting the proceedings. The *Hamdan* Commission is scheduled to hear motions on 14 July 2008. The trial is scheduled for two weeks beginning 21 July 2008. LCDR Mizer is unavailable to represent while in trial with Mr. Hamdan.

c. On 1 May 2008, the Chief Defense Counsel detailed Major Amy Fitzgibbons to Mr. Ali's case. The government has not yet approved Major Fitzgibbons' application for the required security clearances. As result, MAJ Fitzgibbons has not had the opportunity to meet with Mr. Ali or to speak with LCDR Mizer regarding his consultation with Mr. Ali. The Office of the Chief Defense Counsel has received assurances from the Office of the Secretary of Defense that MAJ Fitzgibbons' security clearance is being "fast tracked."

d. Mr. Jeffrey Robinson and Ms. Amanda Lee are civilian practitioners in Seattle, Washington. Both Mr. Robinson and Ms. Lee have extensive experience defending cases involving complex criminal litigation, including conspiracy and domestic terrorism. Based on their demonstrated competency, both Mr. Robinson and Ms. Lee were selected by the National Association of Criminal Defense Lawyers and the American Civil Liberties Union to participate in the John Adams Project. With the assistance of civilian practitioners, the project aims to create defense teams qualified to zealously and effectively represent detainees charged with capital offenses.

e. Mr. Robinson and Ms. Lee have been in contact with the Office of the Chief Defense Counsel since early February 2008. Both counsel applied to the Chief Defense Counsel for inclusion in the pool of civilian counsel qualified to represent detainees. On 10 April, both counsel were notified that they were qualified to

represent detainees conditioned on their receipt of the appropriate security clearances. On 27 February, Mr. Robinson forwarded his completed SF 86 to the Office of the Chief Defense Counsel. Ms. Lee forwarded her application on 29 February.

f. On 16 May 2008, the Chief Defense Counsel requested the Security Manager for the Office of the Secretary of Defense provide a status update regarding civilian counsels' applications for TS/SCI clearances. The Security Manager indicated that Mr. Robinson's clearance had been transferred to the Office of Personnel Management and would be placed on the "fast track" for approval within approximately thirty-five days. Unfortunately, Ms. Lee's clearance was not given the same treatment. Subsequent to this conversation, the Chief Defense Counsel requested that Ms. Lee's clearance also be "fast tracked."

g. No counsel has had the opportunity to meet with Mr. Ali since his charges were referred capitally.

5. Legal Argument and Authority.

a. **Need for Qualified Counsel.** At arraignment, Mr. Ali will make his first appearance before this Commission. At which time, he will be instructed by the Military Judge as to the nature of the charges against him as well as the choices he must make with respect to counsel and the entry of a plea. The assistance of counsel is critical to Mr. Ali's ability to understand the arraignment proceedings and to make intelligent and informed decisions at arraignment.

Mr. Ali is entitled to the assistance of competent counsel during all phases of the proceedings against him. *Powell v. Alabama*, 287 U.S. 45 (1932). In the context of a capital proceeding, the role of counsel assumes an even greater significance. For that reason, the American Bar Association adopted Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (hereinafter "Guidelines") (reprinted at Hofstra Law Review Summer 2003). The Guidelines represent "the national standard of practice for the defense of capital cases." Guideline 1.1 Their jurisdiction extends to trial before military commission. See Discussion to Guideline 1.1. The Guidelines recognize that the only effective approach to capital litigation involves the assembly of a capital defense team, which includes no fewer than two qualified defense counsel. Guideline 4.1. The qualification of counsel is governed by Guideline 5.1. The Guidelines adopt a qualitative approach in determining whether the defense team in the aggregate has the ability to provide high quality legal representation.

In the instant case, LCDR Mizer stands alone in the representation of Mr. Ali. He cannot effectively prepare Mr. Ali for arraignment absent the advice and assistance of additional counsel. Here, counsel stand willing to assist Mr. Ali but have been frustrated in their efforts by their lack of security clearances.

b. **Significance of Arraignment.** The arraignment is not a pro forma proceeding by any measure. First, Mr. Ali is going to be notified of the nature of the charges

against him. Prior to the arraignment, particularly in a capital case, the defense should be given the opportunity to explain to Mr. Ali that his case has been referred capitally. Second, at arraignment, the Military Judge will discuss Mr. Ali's options with respect to the right to counsel. Presumably, the military judge will also explain to Mr. Ali that he has the right to represent himself in these proceedings. In order to make an informed decision, Mr. Ali must be provided the opportunity to consult with counsel. Mr. Ali's decision to work with counsel will have an enduring impact on the actual and perceived fairness of these proceedings. Through this request for delay, the defense is simply seeking the opportunity to establish an attorney-client relationship with Mr. Ali prior to his first appearance.

Finally, the arraignment is significant because it marks the point after which Mr. Ali may elect to absent himself from further proceedings with the permission of the military judge. *See* R.M.C. 804. Several military commissions, including *Hamdan*, are struggling with the prospect of boycotting accused. With a qualified team of counsel, the defense can begin to advise Mr. Ali regarding the military commissions' process and how his defense stands to benefit from his participation.

c. Significance of *Boumediene*. In December 2007, the Supreme Court heard oral arguments in the case of *Boumediene v. Bush*. The court is expected to release its ruling by the end of June. The issue before the Court is whether the Constitutional right to habeas corpus applies to detainees, such as Mr. Ali. In granting the defense request for delay in *Hamdan*, that Commission recognized the *Boumediene* decision will provide guidance regarding the applicability of the Constitution in these proceedings. The *Hamdan* Commission found delay "...permits all parties to have the benefit of a decision that may well change the tenor or conduct of the trial, and avoids the potential embarrassment, waste of resources, and prejudice to the accused that would accompany an adverse decision

mid-trial. . ."

The need for guidance regarding the applicability of the constitution is particularly compelling in this, a capital case. The Supreme Court has long recognized that substantive and procedural protections rooted in the Fourteenth and Eight Amendment to the U.S. Constitution are necessary in capital cases to ensure fairness and reliability. Given the potential impact of this ruling, the Commission should permit a relatively brief delay for its consideration.

d. Significance of *Voir Dire*. An accused has a constitutional right to an impartial judge. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927). Rule for Military Commission 902 (a) states that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." The military judge is cautioned to "broadly construe" the possible grounds for challenge, but he or she should not leave a given case "unnecessarily." RMC (d)(1), Discussion. The defense requires more

time to adequately research the potential grounds for challenge and to develop written questions in response to the military judge's directive. In the event that the Military Judge grants a delay in the arraignment, no party is prejudiced by the grant of additional time to permit the defense team to collectively develop and submit its voir dire questions.

6. The Government opposes the defense requested relief.

7. **Attachments.** In support of the requested relief, the Defense submits the following:

- a. Declaration of Jeffrey Robison, dated 19 May 2008;
- b. Letter from Chief Defense Counsel to Mr. Robinson, dated 10 April 2008;
- c. MC Form 9-2 of Mr. Robinson, dated 21 February 2008;
- d. Declaration of Amanda Lee, dated 19 May 2008;
- e. Letter from Chief Defense Counsel to Ms. Lee, dated 10 April 2008;
- f. MC Form 9-2 of Ms. Lee, dated 25 February 2008; and
- g. *U.S. v Hamdan* Ruling dated 16 May 2008.

Respectfully Submitted,

By: _____
LCDR BRIAN MIZER, JAGC, USN

MAJ AMY FITZGIBBONS, JAGC,
USAR

Detailed Defense Counsel for Ali Abdul Aziz Ali
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, DC 20301
(703) 588-0450

<<...>> <<...>> <<...>> <<...>> <<...>> <<...>> <<...>>

ATTACHMENT E

From: [REDACTED]
Sent: Monday, May 19, 2008 12:52 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: U.S. v. Hawsawi (Continuance Request)
Signed By: [REDACTED]

Sir,

The Defense respectfully submits the following request for continuance with the Court:

1. **Timeliness:** This request is filed within the timeframe established by the Military Judge's order of 14 May 2008.

2. **Relief Requested:** The Defense respectfully requests that this Commission grant a continuance of the 5 June 2008 arraignment date. The defense respectfully requests the Military Judge set the date for arraignment at such time that the government provides the necessary access, clearances and facilities to allow the defense to adequately represent the accused, Mustafa Ahmed Adam al Hawsawi (Mr. Hawsawi).

3. **Overview:** In spite of timely submission, detailed Assistant Defense Counsel (ADC) has not been provided with adequate clearance to properly represent Mr. Hawsawi. As all communications between Mr. Hawsawi and counsel are classified, ADC has been unable to meet the client or discuss client meetings with Lead Defense Counsel (LDC). Further, the lack of a proper facility in which to discuss classified material has hindered the defense's ability to properly work on Mr. Hawsawi's case. Lastly, if Mr. Hawsawi requests civilian counsel, time is needed to located properly qualified counsel. If the Commission does not grant a continuance of the 5 June arraignment, the defense will not be in a position to be adequately prepared for arraignment and render effective assistance of counsel to Mr. Hawsawi.

4. **Burdens of Proof and Persuasion:** As the moving party, the Defense bears the burdens on this motion.

5. **Facts:**

a. On 18 March 2008, ADC's investigation for TS/SCI clearance was initiated. On 21 April 2008, ADC reported for duty at Office of Chief Defense Counsel. On 29 April 2008, ADC was detailed to Mr. Hawsawi's case. ADC has requested periodic updates regarding status of security clearance, however, the only status provided is that the investigation is pending.

b. On 9 May 2008, charges against Mr. Hawsawi were referred to this Military Commission. The defense was served at 1834 hours, 12 May 2008. The charges allege a complex conspiracy spanning several years, involving alleged conduct taking place in or about 1996 to in or about May 2003. To date, defense counsel have not received any discovery, including the referral binder referenced in the referral of charges, relating to Mr. Hawsawi's case.

c. Both LDC and ADC travelled to Cuba 14-15 May. Due to ADC's lack of adequate security clearance, she was unable to meet with Mr. Hawsawi.

d. Prior to referral, detailed defense counsel were unable to meet with Mr. Hawsawi. Since referral, LDC has only been able to meet with Mr. Hawsawi twice. ADC has not met with Mr. Hawsawi, however, he is aware that ADC has been detailed to represent him. Due to the presumptively classified nature of the communications from Mr. Hawsawi, his response cannot be relayed to ADC or to the court at this time.

e. Mr. Hawsawi has also been informed of his right to be represented by a qualified civilian counsel. Due to the presumptively classified nature of the communications from Mr. Hawsawi, his response cannot be relayed to the court at this time. If, however, Mr. Hawsawi wishes to exercise his right to civilian counsel, qualified counsel will need to be located.

f. Defense counsel cannot work with or discuss classified material in Guantanamo Bay. The secure facility in Cuba is not operational so counsel have no place to store work product, discuss classified material or prepare for their case while in Cuba. JTF staff is presently offering space in their secure space for note storage however this is not a long-term solution. Further, there is no adequate secure facility in Washington, DC for defense counsel to prepare their case. The construction for the facility in Washington, DC was to be completed by the end of 2007 but, to date, construction has not begun.

g. Lastly, Mr. Hawsawi's defense team has prior personal commitments that conflict with the 5 June 2008 arraignment date. LDC has a pre-paid college reunion trip scheduled for 4-8 June 2008. ADC has a real estate closing scheduled for 6 June 2008. The team paralegal is part of a dual-military family and her husband's operational commitments require him to be out of the area for the week of 2 June 2008. Accordingly, she will be the primary caregiver for their child during that time and cannot leave the Washington, DC area.

6. Argument: The Military Commission Should Grant a Continuance in Order to Give the Defense an Adequate Opportunity to Prepare for Trial.

a. The Military Judge should grant the defense request for a continuance. It is within his authority to do so. MCA § 949e provides that the "military judge . . . may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." Rule for Military Commission (RMC) 707 additionally provides for the granting of a continuance in the "interests of justice" Such action is necessary here to ensure that the accused has effective assistance of counsel.

b. The MCA guarantees the right of the accused to the "assistance of counsel." MCA § 949a(b)(1)(C). Courts have long recognized that in order for the right to counsel to be meaningful, counsel must have adequate time to prepare a defense. Thus, the Supreme Court stated in *Powell v. State of Ala.*, 287 U.S. 45 (1932): "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." *Id.* at 59. While a trial court's decision on a continuance request is generally reviewed for abuse of discretion, a trial court may not exercise its discretion over continuances so as to deprive the defendant or his attorneys of a reasonable opportunity to prepare. See, e.g., *People v. Snow*, 65 P.3d 749 (Cal. 2003); *Phillips v. State*, 386 N.E.2d 704 (1979) (Trial court must weigh Defendant's right to effective assistance, and to be effective, counsel must be given sufficient opportunity to adequately prepare his case.)

c. At arraignment, Mr. Hawsawi will be asked, among other things, to select his counsel. He will not be able to make an effective selection of counsel without having first the opportunity to meet with the counsel detailed and available to represent him. Further, that counsel (ADC and civilian counsel, if requested) will require adequate time once clearance is obtained to properly acquaint themselves with Mr. Hawsawi's case to adequately prepare for arraignment and trial.

d. As the significant matters outlined in a - f above are beyond the control of the defense, defense respectfully request a continuance until such time the government supplies: the requisite clearance for ADC and the appropriately secure facilities to store classified material and allow for defense preparation of this case. Further, time is required to locate qualified civilian counsel if Mr. Hawsawi requests civilian counsel.

e. As these matters are outside of defense's control, the defense is unable to specify a date of availability. The defense respectfully requests a RMC 802 telephonic conference with all parties at an established interval of time to ascertain the progress of the requested items. Defense seeks only to fully and adequately represent Mr. Hawsawi at each stage of these proceedings and allow him the competency of counsel to which he is entitled.

7. Oral Argument: The Defense does not request oral argument in connection with this motion.

8. Witnesses: None.

9. Certificate of Conference: The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

10. Additional Information: In making this request, Mr. Hawsawi does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in all appropriate forms.

Respectfully submitted by:

MAJ JON JACKSON, USAR

LT GRETCHEN SOSBEE, JAGC, USN

Detailed Defense Counsel for Mustafa Ahmed Adam al Hawsawi

ATTACHMENT F

UNITED STATES OF AMERICA

**Commission Ruling
D-002-006**

**Motions
for Continuance of Initial
Session/Arraignment**

v.

KHALID SHEIK MOHAMMED et al

22 May 2008

1. Nature of Motion:

a. Detailed defense counsel for each of the five accused submitted D-002-006. Each submission seeks a continuance of the initial session previously ordered and scheduled for 5 June 2008. This ruling addresses all five of the noted continuance requests.

b. The five continuance requests express several common bases for the requested relief:

(1) Although the detailed defense counsel for each accused apparently possesses the requisite security clearances for performance of her or his duties, clearance granting procedures are still underway with regard to numerous assistant defense counsel and civilian defense counsel;

(2) The lack of security clearances for assistant defense counsel and civilian defense counsel has limited their involvement in the case with regard to matters such as meeting with clients, discussing the detailed defense counsel's meetings with the clients, and examining classified portions of discovery materials;

(3) Due to logistic and security factors, detailed defense counsel have had, to date, only a limited ability to meet with their clients;

(4) Defense office spaces at GTMO and in Washington DC are deemed inadequate to deal with the classified material associated with this case;

(5) Discovery matters have not been completed; and

(6) Several counsel have personal matters planned that conflict with the previously ordered initial session date of 5 June 2008.

c. The Commission finds that counsel have adequately covered all matters of import to this issue within the confines of the motions and the response, such that a reply to the response is not necessary.

2. Discussion:

a. Charges in this case were referred to the Commission for trial on 9 May 2008. The 5 June 2008 initial session was ordered by the Military Judge on 14 May 2008 after the Military Commission Trial Judiciary Staff received notice concerning the detailing of counsel as trial and defense counsel.

b. Service of charges upon the accused in accordance with RMC 602 was accomplished on 21 May 2008, thereby initiating the speedy trial provisions of RMC 707.

c. The initial session is intended to:

- 1) satisfy the RMC 707 requirement for arraignment of the accused in accordance with RMC 904 within 30 days of service of the referred charges; and,
- 2) provide the Military Judge the opportunity to advise the accused with regard to their rights to counsel and to ascertain whether or not the accused intend to exercise their counsel rights; and
- 3) ascertain what counsel, if any, will be representing the accused.

d. Some of the issues raised in D-002-006 are matters of consequence with regard to ensuring the defense is provided a full opportunity to prepare for trial. None of the issues raised in D-002-006, however, provide a valid basis for delaying the initial session and arraignment in this case. As noted in the prosecution response to D-002-006, the arraignment process does not require any decision making or action of consequence by the defense beyond the counsel right elections noted above. In this regard, it is typical for accused in military courts of all types to defer entry of motions and pleas during an initial court session. Additionally, it is well established that elections made at initial court sessions, to include counsel selections, are routinely changed at a later stage of the proceedings. Accordingly, the fact that all defense counsel are not yet fully integrated into the litigation process is not a valid basis in support of the continuance request.

e. Several of the defense submissions express concern that defense counsel other than the detailed defense counsel are not yet in a position to participate in development of possible voir dire of the Military Judge prior to the 26 May 2008 submission deadline established in the Commission order of 14 May 2008. In this regard, the Commission notes that the 26 May 2008 voir dire submission deadline applies only in the event counsel for an accused intend to conduct voir dire of the Military Judge at the initial session. In the event that counsel for the accused elect to defer voir dire of the Military Judge until the next session of the case, a later submission deadline will be established.

f. Similarly, the concerns expressed by the defense with regard to the adequacy of their working spaces is not a matter that justifies a delay of the initial session and arraignment in this case. Based on the representation in the prosecution response with regard to the approval of the SCIF for the ELC at GTMO, it appears that progress is being made with regard to dealing with the logistic challenges associated with this case. It is likely that the lawyers' tasks in this case are going to be difficult in several regards. If the office space concerns noted in D-002-006 remain unresolved such that the

inadequacy is interfering with the defense's responsibility with regard to their clients, the defense will be allowed to submit subsequent requests for relief concerning litigation milestones that will be established by the Military Judge.

g. The fact that discovery in accordance with the MMC has not yet been completed is not a proper basis for continuing the initial session and arraignment in any case. Discovery milestones will be established by the Military Judge and it is likely that some measure of litigation will be required before that process will be deemed complete.

h. The Commission regrets that the established litigation schedule conflicts with the personal plans of some of the counsel in this case. These personal conflicts, however, do not provide an appropriate basis for delaying the scheduled 5 June 2008 session. Starting the process and establishing a schedule will benefit all counsel with regard to avoiding future conflicts.

i. The Commission finds that the interests of justice in this case will be best served by completion of the initial session and arraignment as previously ordered on 5 June 2008. The Commission recognizes that there are many logistic and legal issues that will need to be addressed in this case. It is precisely because of the anticipated complexity of this case, that it is important that the process get underway.

3. **Ruling:** The defense requests in D-002-006 for continuance of the initial session and arraignment scheduled for 5 June 2008 are denied.

RALPH H. KOHLMANN
Colonel, U.S. Marine Corps
Military Judge

ATTACHMENT G

UNITED STATES OF AMERICA,

v.

ALI ABDUL AZIZ ALI

**DECLARATION OF CIVILIAN
DEFENSE COUNSEL RE:
NOTICE OF APPEARANCE
AND AGREEMENT**

(MAY 19, 2008)

I, JEFFERY P. ROBINSON, hereby declare as follows:

1. I am a civilian attorney license to practice in the State of Washington. I make this declaration based upon personal knowledge. I am over the age of 18 and competent to testify to the matters set forth herein.

2. My office address, phone numbers, and email addresses are: 810 THIRD AVENUE, SUITE 500, SEATTLE, WA 98104, (TEL) 206.622.8000, (FAX) 206.682.2305, (EMAIL) ROBINSON@SGB-LAW.COM.

3. I have been notified of the Military Commission Trial Judge's directive of May 14, 2008, that "Civilian counsel who intend to be Civilian Defense Counsel (CDC) on this case shall provide a signed and completed copy of Form 4-1, the CDC Notice of Appearance and Agreement (See Rules of Court) via email to the MCTJ Staff NLT 1630 hours EDT, 19 May 2008."

4. I have been in communication for several weeks with Lt. Cmdr. Brian Mizer, who is detailed military counsel for Mr. Ali. I understand that Mr. Ali wishes to meet with Ms. Lee and me to confirm our representation of him as civilian defense counsel within the meaning of the Military Commissions Act.

5. I am familiar with the requirements of the Military Commissions Act, § 949c(3) for civilian defense counsel representing accused persons. I am a United States citizen. I am and active member in good standing licensed to practice law in the following jurisdictions: WASHINGTON STATE; UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON; NINTH CIRCUIT COURT OF APPEALS. I have not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct.

6. I have signed a written agreement to comply with all applicable regulations or instructions for counsel, including the rules of court for conduct during the proceedings. I have attached MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel.

7. I have submitted the following application materials to be determined eligible for access to classified information at a level appropriate for the case. On February 27, 2008, I submitted the Questionnaire for National Security Positions, form SF86, and on April 10, 2008, I submitted the SCI Nondisclosure Agreement. I understand that the processing of my application for TS/SCI clearance is ongoing.

8. It is my intention to file MC Form 4-1, Notice of Appearance, at the earliest possible date consistent with the client's confirmation of my representation of him in this matter. Communication with Mr. Ali is impossible without the security clearance required in this case. I am available to travel to GTMO to meet with Mr. Ali as soon as I receive the requisite clearance. Until then, however, I have no ability to communicate in person with Mr. Ali on matters related to representation and the case. Without an effective avenue for communication, I do not believe I can in good conscience represent to the tribunal that I am competently or effectively representing Mr. Ali's interests.

9. Speaking to a client prior to the time of arraignment is important in any criminal case. This is especially true where, as here, the arraignment is a critical stage – a point at which rights and responsibilities are triggered or may be waived. In order for a client to make an informed decision about the consequences of his actions at arraignment, the client must have communicated with counsel, generally through meetings and discussions before the appearance at arraignment.

10. In a capital case the need for personal contact and discussion before arraignment is even more important. Counsel must be sure that the client understands that conviction may lead to his execution. The potential for execution may have an enormous impact on the client's decisions about the nature and course of his defense. A client may choose an aggressive defense that challenges any and all allegations made by the government. Or a client may decide to have counsel approach the government to negotiate a resolution that avoids the death penalty. A client may even determine that he wishes to plead guilty at arraignment or soon thereafter and concentrate the defense effort on the penalty phase.

11. I have 27 years of criminal trial experience, and I have been counsel in a capital murder case in Washington State. I am not currently certified in the state of Washington to be lead counsel in a capital murder case without the assistance of counsel experienced in the law of capital punishment. Therefore it will be necessary for other counsel to appear at a later date to insure that Mr. Ali has appropriate representation consistent with guidelines set by the American Bar Association and Washington State Superior Court Special Proceedings Rule 2.

12. In my experience, these are discussions that must begin before the arraignment date. Due to the lengthy process of obtaining the required security clearance in this matter, Ms. Lee and I have not been able to gain a detailed factual understanding of the case or to even meet with Mr. Ali. Thus, while we have no desire to evade a directive of the tribunal, we are in a position that prevents us from undertaking even the most basic tasks of representing Mr. Ali.

I declare under penalty of perjury under the laws of the State of Washington and of the United States of America that the foregoing is true and correct.

DATED in Seattle, Washington, this 19th day of May, 2008.



JEFFERY F. ROBINSON

UNITED STATES OF AMERICA,

v.

ALI ABDUL AZIZ ALI

**DECLARATION OF CIVILIAN
DEFENSE COUNSEL RE:
NOTICE OF APPEARANCE
AND AGREEMENT**

(MAY 19, 2008)

I, AMANDA E. LEE, hereby declare as follows:

1. I am a civilian attorney license to practice in the State of Washington. I make this declaration based upon personal knowledge. I am over the age of 18 and competent to testify to the matters set forth herein.

2. My office address, phone numbers, and email addresses are: 810 THIRD AVENUE, SUITE 500, SEATTLE, WA 98104, (TEL) 206.622.8000, (FAX) 206.682.2305, (EMAIL) LEE@SGB-LAW.COM.

3. I have been notified of the Military Commission Trial Judge's directive of May 14, 2008, that "Civilian counsel who intend to be Civilian Defense Counsel (CDC) on this case shall provide a signed and completed copy of Form 4-1, the CDC Notice of Appearance and Agreement (See Rules of Court) via email to the MCTJ Staff NLT 1630 hours EDT, 19 May 2008."

4. I have been in communication for several weeks with Lt. Cmdr. Brian Mizer, who is detailed military counsel for Mr. Ali. I understand that Mr. Ali wishes to meet with Mr. Robinson and me to confirm our representation of him as civilian defense counsel within the meaning of the Military Commissions Act.

5. I am familiar with the requirements of the Military Commissions Act, § 949c(3) for civilian defense counsel representing accused persons. I am a United States citizen. I am and active member in good standing licensed to practice law in the following jurisdictions: WASHINGTON STATE; UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON; NINTH CIRCUIT COURT OF APPEALS. I have not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct.

6. I have signed a written agreement to comply with all applicable regulations or instructions for counsel, including the rules of court for conduct during the proceedings. I have attached MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel.

7. I have submitted the following application materials to be determined eligible for access to classified information at a level appropriate for the case. On February 29, 2008, I submitted the Questionnaire for National Security Positions, form SF86, and on April 10, 2008, I submitted the SCI Nondisclosure Agreement. I understand that the processing of my application for TS/SCI clearance is ongoing.

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10. In a capital case the need for personal contact and discussion before arraignment is even more important. Counsel must be sure that the client understands that conviction may lead to his execution. The potential for execution may have an enormous impact on the client's decisions about the nature and course of his defense. A client may choose an aggressive defense that challenges any and all allegations made by the government. Or a client may decide to have counsel approach the government to negotiate a resolution that avoids the death penalty. A client may even determine that he wishes to plead guilty at arraignment or soon thereafter and concentrate the defense effort on the penalty phase.

11. I have been engaged in criminal defense practice for over eleven years. Prior to that, I clerked in federal district and appellate courts for five years. I served as designated capital clerks at both the district and appellate levels, and served on the Ninth Circuit Death Penalty Task Force. I am not currently certified in the state of Washington to be lead counsel in a capital murder case without the assistance of counsel experienced in the law of capital punishment. Therefore, it will be necessary for other counsel to appear at a later date to insure that Mr. Ali has appropriate representation consistent with guidelines set by the American Bar Association and Washington State Superior Court Special Proceedings Rule 2.

12. In my experience, these are discussions that must begin before the arraignment date. Due to the lengthy process of obtaining the required security clearance in this matter, Mr. Robinson and I have not been able to gain a detailed factual understanding of the case or to even meet with Mr. Ali. Thus, while we have no desire to evade a directive of the tribunal, we are in a position that prevents us from undertaking even the most basic tasks of representing Mr. Ali.

I declare under penalty of perjury under the laws of the State of Washington and of the United States of America that the foregoing is true and correct.

DATED in Seattle, Washington, this 19th day of May, 2008.


AMANDA E. LEE